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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, v. DUNCAN D. HUNTER, Defendant.	Case No. 18CR3677-W RESPONSE AND OPPOSITION OF THE UNITED STATES TO DEFENDANT DUNCAN D. HUNTER'S MOTION TO DISMISS COUNTS 45-57

The United States, by and through its counsel, David D. Leshner, Attorney for the United States, and Emily W. Allen, W. Mark Conover, and Phillip L.B. Halpern, Assistant U.S. Attorneys, hereby responds to Defendant's Motion To Dismiss Counts 45-57.

I

INTRODUCTION

On August 21, 2018, Congressman Duncan D. Hunter ("Hunter" or "the defendant") and his wife, Margaret Hunter, were indicted and charged with one count of conspiracy to commit an offenses, in violation of 18 U.S.C. § 371; 43 counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2; 13 counts of falsification of records related to campaign finance, in

violation of 18 U.S.C. §§ 1519 and 2, and three counts of prohibited use of campaign contributions, in violation of 52 U.S.C. §§ 30109(d) and 20114(b)(1) and 18 U.S.C. § 2. On June 13, 2019, Margaret Hunter entered a guilty plea to Count One of the indictment, pursuant to a plea agreement. Trial against Hunter is set to begin on September 10, 2019.

In Counts 45-57 of the Indictment, the United States alleged that the defendant "knowingly concealed, covered up, falsified, and made a false entry" in thirteen different Federal Election Committee ("FEC") Form 3 Reports of Receipts and Disbursements, with the "intent to impede, obstruct, and influence the investigation and proper administration of matters within the jurisdiction of the Federal Election Commission and the Federal Bureau of Investigation, and in relation to and in contemplation of such matters." Doc. 1, ¶ 28. Each of the thirteen counts specifies the precise date and title of each of the allegedly falsified reports.

II

LEGAL STANDARD

Pursuant to Federal Rule of Criminal Procedure 7, an indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). "[A]n indictment or information is sufficient if it 'first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" United States v. Huping Zhou, 678 F.3d 1110, 1113 (9th Cir. 2012) (quoting Hamling v. United States, 418 U.S. 87, 117 (1974)). "A defendant may not properly challenge an indictment, sufficient on its face, on the ground that the allegations are not supported by adequate evidence." United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996) (quoting United States v. Mann, 517 F.2d 259, 267 (5th Cir.1975)). In ruling on a motion to dismiss an indictment for failure to state an offense, like those brought by defendant in this case, "the district court is bound by the four corners of the indictment" and "must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged." United States v. Boren, 278 F.3d 911, 914 (9th Cir. 2002).

III

ANALYSIS

Under a number of headings and subheadings, defendant mounts three increasingly impotent attacks against Counts 45-57 which allege violations of 18 U.S.C. § 1519.[1] To support his arguments, defendant recites only a supposed litany of harms and paradoxical results that might befall our Republic should these Counts remain in the Indictment, while ignoring the inconvenient truth: Courts have repeatedly upheld the use of Section 1519 to address fraud and false statements in FEC reports, and have repeatedly rejected the preemption and vagueness arguments raised by his motion. United States v. Singh, 924 F.3d 1030, 1047-53 (9th Cir. 2019) (affirming convictions of both FECA and Section 1519); United States v. Benton, 890 F.3d 697, 710-11 (8th Cir. 2018) (affirming convictions under 18 U.S.C. § 1519 for false financial reports to the FEC); United States v. Rowland, 826 F.3d 100, 107 (2d Cir. 2016) (affirming convictions under 18 U.S.C. § 1519 for false contracts created in order to avoid reporting requirements to the FEC); United States v. Prall, 19CR13, 2019 WL 1643742, at *2-*3 (W.D. Tex. April 16, 2019) (Slip Opinion) (denying motion to dismiss indictment, and rejecting argument that FECA preempts 18 U.S.C. § 1519 where defendant allegedly used political committee funds for personal expenses and then falsely informed treasurer of political committees that the funds were spent on legitimate political committee expenditures, knowing that they would be falsely reported to the FEC); United States v. Lundergan, 18CR106, 2019 WL 1261354, at *4-*5 (E.D. Ky. March 18, 2019) (Slip Opinion) (denying motion to dismiss indictment, and rejecting argument that 18 U.S.C. § 1519 does not apply to campaign finance violations where defendants allegedly had vendors and consultants perform services for a candidate and political committee and then had payment rendered by various companies in

[1] The defendant's arguments parallel those from United States v. Schock, 16CR30061, 2017 WL4780614, at *15-16 (C.D. Ill. Oct. 23, 2017). In a well-reasoned and persuasive opinion, the district court in Schock roundly rejected each of those arguments, id., and this Court should, likewise, reject them here.

order to hide those payments from the FEC); United States v. Schock, 16CR30061, 2017 WL4780614, at *15-*16 (C.D. Ill. Oct. 23, 2017) (denying motion to dismiss Indictment and rejecting arguments that charges should have been brought under FECA rather than 18 U.S.C. § 1519 and that 18 U.S.C. § 1519 is unconstitutionally vague, where congressman was alleged to have made false FEC filings). This Court should follow suit and deny defendant's Motion to Dismiss Counts 45-57.

A. **FECA Does Not Preempt Prosecution Under 18 U.S.C. § 1519**

It is well settled that when an act violates more than one criminal statute, the United States may prosecute under one or all of the statutes, and defendant can be convicted of violating more than one statute. United States v. Batchelder, 442 U.S. 114, 123–24 (1979); United States v. Duncan, 693 F.2d 971, 975 (9th Cir. 1982). The only exception to this general precept is where Congress clearly intended that one statute supplant the other. Here, the defendant's illegal acts violated FECA as well as 18 U.S.C. § 1519, the statute criminalizing the "destruction, alteration, or falsification of records" in federal matters, and because both statutes comfortably co-exist without irreconcilable conflict, the United States has properly charged and the defendant can be convicted for violating both statutes.

The preemption doctrine generally applies to circumstances not present here, where a state statute conflicts with a federal regulatory scheme. See, e.g., Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982) ("As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes."). Preemption among purely federal statutes implicates none of these constitutional concerns; thus, the implied preemption of one federal statute by another is exceedingly rare and must be evidenced by unambiguous congressional intent for one law to partially or completely repeal another. Posadas v. National City Bank of New York, 296 U.S. 497, 503 (1936) ("The amending act just described contains no words of repeal . . . . The cardinal rule is that repeals by implication are not favored."). "Where there are two acts upon the same subject, effect should be given to both if possible. Id. Absent express repeal – a contention defendant does not advance -- there are only two scenarios justifying constructive preemption: (1) the

provisions in two statutes are in irreconcilable conflict or (2) a later statute covers the whole subject of an earlier statute and is clearly intended as a substitute, i.e., occultation. Prall, 19CR13, 2019 WL 1643742, at *2-*3. However, in the absence of some affirmative showing of an intention to supplant and repeal, the only permissible justification for repeal by implication is when the earlier and later statutory provisions are in irreconcilable conflict. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978).

While arguing, as a matter of law, that FECA forecloses charging the defendant with violations of 18 U.S.C. § 1519 for knowingly submitting false campaign expenditures, defendant provides no basis in law for this contention. Confoundingly, he cites no preemption law in his brief, nor does he claim that any particular provision of FECA stands in irreconcilable conflict with 18 U.S.C. § 1519.[2] Instead, in arguing that applying Section 1519 to defendant's false campaign filings "would displace Congress's tailor-made [campaign finance] scheme," defendant appears to be invoking the general principle of substitution, i.e., that Congress clearly intended FECA as a substitute for any and all other criminal statutes when dealing with campaign expenditures. Doc. 45-1 at 18-21. Defendant supports his substitution argument by outlining a litany of purportedly ill-directed policy outcomes and "paradoxical results" of applying both FECA and Section 1519, but what defendant does not do is point to any affirmative showing in the text of FECA or elsewhere that Congress intended

[2] Defendant does not argue "irreconcilable conflict" between any provision of FECA and Section 1519 because there is no such conflict. The only FECA provision defendant cites, 52 U.S.C. § 30109, is a penalty provision which does not conflict with Section 1519. Prall, 19CR13, 2019 WL 1643742, at *2, 6 n.2 (rejecting contention that FECA's penalty provision, 52 U.S.C. § 30109 preempted Section 1519). Though not mentioned by the defendant, the United States recognizes that Section 1519 (and Section 1001) and FECA's reporting requirements, 52 U.S.C. § 30104(b), do, to a limited extent, address the same subject matter – the reporting of campaign expenditures – but the provisions are, in effect, complimentary, and in no way stand in irreconcilable conflict. Id. at *3 (noting overlap but finding no conflict between Section 1519 and 52 U.S.C. § 30104(b)). Not surprisingly, preemption in this specific context has, thus, been universally rejected. Prall, 19CR13, 2019 WL 1643742 at *3-4 (quoting Hopkins, 916 F.2d at 219) (holding "the offenses under Title 18 thus stand wholly apart and separate from any violation of the federal election laws").

FECA to repeal Section 1519 (or any other criminal statute) or for that matter cite to any authority supporting his preemption by substitution contention. These omissions are not surprising because there is no such authority for preemption in this context.[3] United States v. Hopkins, 916 F.2d 207, 218 (5th Cir. 1990) ("There is no indication in the federal election laws that Congress intended them to supplant the general criminal statutes found in Title 18."); see also, Benton, 890 F.3d at 711 (rejecting contention that FECA preempted § 1519); United States v. Hsia, 176 F.3d 517, 525 (D.C. Cir. 1999) (specifically rejecting the argument that "FECA constitutes a pro tanto repeal of §§ 2 and 1001"); United States v. Curran, 20 F.3d 560, 565-66 (3d Cir. 1994) (rejecting argument that "because it targets specific conduct, the Election Campaign Act supersedes the more general criminal provisions of Title 18"); United States v. Duncan, 693 F.2d 971, 975 (9th Cir. 1982) ("There is no reason that Duncan cannot be charged and convicted under 18 U.S.C. § 1001 simply because another statute [31 U.S.C. §1058] is also applicable."). Certainly if Congress had intended to supplant and repeal all of Title 18 in the campaign expenditure context it would have said so, either in the passage of FECA, or its subsequent amendments, or it would have noted the exclusion in the passage of the broad catch-all obstruction of justice statutes, like Section 1519. Prall, 19CR13, 2019 WL 1643742, at *2-*3. ("Further the Court finds in the text of the FECA no affirmative showing of an intention to repeal any other criminal statute").

Indeed, notwithstanding defendant's meritless arguments to the contrary, the production of false financial records by a political campaign fits comfortably within the framework of conduct criminalized by Section 1519. S. Rep. No. 107-146, 14 (describing Section 1519 as being "meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the [requisite] intent"). As explicated in Lundergan, under the plain language of the statute, Section 1519 applies to violations of FECA. "Regulation of campaign finances rests in the proper administration of the FEC, an agency of the United States.

[3] That defendant has neglected to cite any of the federal cases discussing the relationship between FECA and Section 1519 bears witness to the fact that the unanimous weight of authority in this country resoundingly rejects his legal position.

Financial disclosures are records typically used in the regulation of such finances. Intentionally altering, destroying, mutilating, concealing, covering up, falsifying or making a false entry in those disclosures would impede, obstruct or influence the proper administration of regulation within the FEC. Lundergan, 18CR106, 2019 WL 1261354 at *4. Likewise, in Benton, 890 F.3d at 711, the Eighth Circuit rejected the argument that "applying Section 1519 to false reports of campaign expenditures would render [FECA] superfluous." In that case, as in Lundergan, the court held that the production of false financial records by a political campaign fits squarely within the framework of conduct criminalized by Section 1519.[4] Id.

In passing, defendant suggests that the First Amendment dictates that FECA impliedly preempted all other statutes policing campaign expenditures. Doc. 45 at 12-13 ("In this sensitive area, Congress crafted an intricate statutory scheme in the FECA to regulate federal election campaigns."). But, as Prall recently recognized, the First Amendment does not shield fraud, see, e.g., Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 800 (1988) (holding in the context of a First Amendment challenge to prior restraints on charitable solicitations that "the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements."); Illinois, ex rel. Madigan v. Telemarketing Assoc., Inc., 538 U.S. 600, 624 (2003) ("Consistent with our precedent and the First Amendment, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used."), and there is no constitutional value in false statements of fact, particularly as a matter of campaign finance law. Prall, at *3.[5] Defendant's attempts to find support for preemption in the First Amendment is, therefore, meritless.

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[4] Reliance on Yates v. United States, 135 S. Ct. 1074, 1079 (2015), to support defendant's preemption argument is misplaced. In Yates, the Court concluded that a "tangible object" as set forth Section 1519 must be one used to record and preserve information. An undersized fish was not such a tangible object in Yates, but a false campaign finance record certainly is. Benton, 890 F.3d at 711; Lundergan, 18CR106, 2019 WL 1261354 at *4.

[5] Finally, defendant's contention that there is no "established practice of applying Section 1519 to police false and fraudulently made campaign disclosure reports, Doc. 45-1 at

Ultimately, exactly as Congress envisioned, Hunter was charged with violating multiple statutes, each criminalizing different aspects of his conduct.[6] Now a jury will decide. Duncan, 693 F.2d at 975 (noting a defendant can be convicted of violating more than one statute).

B. **Regulation of Campaign Finances and Investigations of Campaign Finance Irregularity Rests in the Proper Administration of the Federal Election Commission and the Federal Bureau of Investigations**

Section 1519 criminalizes a false entry in a record or document made with the intent to impede, obstruct, or influence the investigation or proper administration of justice of a matter within the jurisdiction of any department or agency of the United States. As alleged in the Indictment in this case, regulation and "enforce[ment of the] campaign finance laws in United States federal elections" and "investigat]ions of] the potential improper use of campaign funds by candidates and elected Members of Congress" are matters within the jurisdiction of the Federal Election Commission and the Federal Bureau of Investigations, respectively, Doc. 1 ¶¶ 1-5, and Hunter violated Section 1519 by, among other things, concealing, falsifying, and making false entry in a record or document with the intent to impede, obstruct, or influence the investigation or proper administration of justice of a matter within the jurisdiction of the FEC and FBI, ¶¶ 27-28, all in violation of 18 U.S.C. § 1519 and 18 U.S.C. § 2

21, is irrelevant as a matter of law, but also fundamentally in err. See, e.g., Benton, 890 F.3d at 710-11; Rowland, 826 F.3d at 107; Prall, 19CR13, 2019 WL 1643742, at *2-*3; Lundergan, 18CR106, 2019 WL 1261354, at *4-*5; Schock, 16CR30061, 2017 WL4780614, at *15-16.

[6] Hunter's contentions that differing mens rea and penalty schemes should sway the Court's decision were foreclosed by the Supreme Court in Batchelder. "The prosecutor's discretion extends to cases involving statutes with different proof requirements and penalties. Indeed, "just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he shall be sentenced. Batchelder, 442 U.S. at 125. The district court in Schock, likewise, resoundingly rejected this argument. 16CR30061, 2017 WL4780614, at *17 ("Based on precedent outlined in Batchelder, the court cannot concern itself with the many options available to the Government in a criminal prosecution nor with the fact that one option may have a greater proof requirement and a more serious penalty.").

Defendant contends, however, that the Indictment is fatally deficient because it "fails to specify 'the matter'[7] that Hunter intended to impede, obstruct, or influence through the routine filing of [false] campaign disclosures identified in Counts 45-57." Doc. 45-1 at 21. In Counts 45-57, the Indictment on its face, which incorporates ¶¶1-5 by reference, and which correctly recites the text of Section 1519, is properly pled, and the district court "must accept the truth of the allegations in analyzing whether a cognizable offense has been charged.

The Ninth Circuit has, moreover, very recently rejected precisely this argument. In Singh, the Ninth Circuit squarely held that investigations of violations of FECA are matters within the jurisdiction of the FBI. Singh, 924 F.3d at 1052. Regulation and enforcement of the campaign finance laws are, likewise, matters within the jurisdiction of the FEC. Benton, 890 F.3d at 711, Lundergan, 18CR106, 2019 WL 1261354 at *4.

Much of Hunter's remaining stray commentary deals with issues of fact for trial. Even then, however, Hunter need not have intended to impede, obstruct of influence an actual ongoing investigation; instead, the mere fact that Hunter, as a multi-term congressman, contemplated the prospect of regulation, enforcement, or investigation of the campaign finance laws satisfies the element. Singh, 924 F.3d at 1052 (citing United States v. Gonzalez, 906 F.3d 784, 793-796 (9th Cir. 2018). In Singh, for example, the evidence was sufficient to sustain defendant's conviction where he had a long history of involvement in campaigns and elections, was warned about campaign reporting requirements, limited his paper trail, and used code names and admonished those talking about campaign contributions in email. Id. at 1052. Similar evidence will be introduced against Hunter which will prove beyond a reasonable doubt his intent to impede and obstruct matters within the jurisdiction of the FEC and FBI. See also Schock, 16CR30061, 2017 WL4780614, at *19-*20.

[7] Defendant's references to United States v. McDonnell, 136 S. Ct. 2355, 2372 (2016) and United States v. Marinello, 138 S. Ct. 1101, 1104 (2018), get him nowhere, for those cases address different statutes, different terms, and different contexts. Relevant to this issue are the cases, including binding precedent, uniformly interpreting Section 1519. See, e.g., Singh, 924 F.3d at 1052; Benton, 890 F.3d at 711; Lundergan, 18CR106, 2019 WL 1261354 at *4.

C. Section 1519 Is Not Unconstitutionally Vague

Finally, this Court should reject defendant's contention that Section 1519 is unconstitutionally vague as applied. A statute is unconstitutionally vague as applied if it "failed to put a defendant on notice that his conduct was criminal." United States v. Kilbride, 584 F.3d 1240, 1257 (9th Cir. 2009); United States v. Mincoff, 574 F.3d 1186, 1201 (9th Cir. 2009) (noting statute is impermissibly vague if it "fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement"). "[V]agueness ... rest[s] on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." Pest Comm. v. Miller, 626 F.3d 1097, 1111 (9th Cir. 2010). Similarly, a statute is unconstitutionally vague on its face if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Harris, 705 F.3d 929, 932 (9th Cir. 2013).

1. Hunter Has Not Made An As Applied Vagueness Claim

Hunter does not claim that he personally lacked notice that his conduct was criminal, nor that the Indictment is insufficiently clear as to what he is alleged to have done. The Indictment tracks the language of the statute, and clearly alleges that Hunter "knowingly concealed, covered up, falsified, and made a false entry" in the 13 listed FEC reports, and that he did so, "with the intent to impede, obstruct, and influence the investigation and proper administration of matters within the jurisdiction of the [FEC] and the [FBI]." Hunter similarly does not allege that the statutory language is unclear. His "as applied" challenge therefore fails, because he does not claim that he was not on notice that his conduct was criminal. Nor could he because 18 U.S.C. § 1519 "rather plainly criminalizes the conduct of an individual who (1) knowingly (2) makes a false entry in a record or document (3) with intent to impede or influence a federal investigation." United States v. Hunt, 526 F.3d 739, 743 (11th Cir. 2008) ("Nothing here suggests [Section 1519] is, in the context before us, vague."); United States v. Moyer, 674 F.3d 192, 212 (3d Cir. 2012) ("Because a defendant will be convicted for violating § 1519 only for an act knowingly done with the purpose of doing that which the

statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."); Lundergan, at *6 (rejecting hypothetical vagueness concerns and upholding Section 1519 against vagueness challenge).

2. Hunter's Facial Vagueness Challenge Fails

Hunter instead appears to mount a facial challenge to the statute, claiming that Section 1519 allows arbitrary and discriminatory enforcement because "all political committees must file FEC reports" and therefore "there will likely be many errors that could support a prosecution on the government's theory in this case." Doc. 45 at 25. Hunter further claims that the application of Section 1519 in the context of FEC reporting would "chill core political speech." Id. at 26. Although, "ordinarily a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," the courts have "relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." Kilbride, 584 F.3d at 1258 (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). However, "[e]ven when a challenger brings a facial challenge to a statute that is claimed to interfere with the challenger's right of free speech or of association where a more stringent vagueness test should apply, speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended application." United States v. Evans, 883 F.3d 1154, 1166 (9th Cir. 2018) (internal citations and quotations omitted).

a. There Are No First Amendment Protections for Fraud

Section 1519 does not regulate any "protected speech." Period. At issue is not "political speech," but rather lies, fraud, and deception: in Counts 45-57, the Indictment alleges that Hunter repeatedly filed false FEC reports. The Supreme Court is clear that "the First Amendment does not shield fraud." Madigan, 538 U.S. at 612; see also United States v. Alvarez, 567 U.S. 709 (2012) ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment."); Gertz v. Robert Welch, Inc., 418

U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."). Thus, Section 1519 as applied in the present case and the majority of cases does not chill political speech, but rather prevents fraud on the FEC, the taxpayers, and the political system. The First Amendment therefore does not apply, and Hunter's facial challenge fails.

As it is clear that Section 1519 does not regulate any protected political speech, the defendant may only challenge the statute as applied to himself and the facts of his case, Holder v. Humanitarian Law Project, 561 U.S. 1, 18-19 (2010); Lundergan, 18CR106, 2019 WL 1261354 at *6, and this Court should not consider defendant's invitation to speculate about Section 1519's application to future hypothetical defendants. Lundergan, 18CR106, 2019 WL 1261354 at *6 ("Any additional concern over future prosecution is a hypothetical situation which cannot establish unconstitutional vagueness.").

b. Section 1519 Is Not Subject to Arbitrary or Discriminatory Enforcement[8]

Even if the Court reaches the merits of the defendant's facial challenge, it still fails. The plain language of the statute only criminalizes actions by individuals who act "knowingly" and with the intent to "impede, obstruct, or influence." 18 U.S.C. § 1519. The statute does not criminalize mere mistakes made in good faith, but rather knowing falsehoods made for the purpose of impeding and obstructing mattes within the jurisdiction of the FEC or FBI. See Lundergan, 18CR106, 2019 WL 1261354 at *6 (rejecting vagueness challenge where defendants were accused of concealing expenditures from the FEC "because the jury is required to find [the defendants'] specific intent in order to return a guilty verdict, any concern that [Section] 1519 . . . could result in a conviction for [defendants'] 'innocent conduct' is misplaced."). Indeed, precisely because Section 1519 requires "proof of a specific intent to impede, obstruct, or influence a federal matter, [it] provides sufficient notice of what conduct is prohibited, and is not subject to arbitrary or discriminatory enforcement." United States v.

[8] The defendant does not mount the other possible aspect of the facial challenge -- that 18 U.S.C. § 1519 "fails to provide a person of ordinary intelligence fair notice of what is prohibited," likely because he cannot, as the statute is clear in its proscriptions. See Harris, 705 F.3d at 932; Hunt, 526 F.3d at 743; Moyer, 674 F.3d at 212.

Stevens, 771 F. Supp. 2d 556, 562 (D. Md. 2011); see United States v. Moyer, 674 F.3d 192, 211-12 (3d Cir. 2012) ("Scienter requirements in criminal statutes alleviate vagueness concerns because a mens rea element makes it less likely that a defendant will be convicted for an action committed by mistake.").[9] Perhaps unsurprisingly, it appears that every court that has considered a vagueness challenge to Section 1519 has rejected it.[10] United States v. Kernell, 667 F.3d 746, 756 (6th Cir. 2012) (holding Section 1519 is not unconstitutionally vague); Moyer, 674 F.3d at 211 (same); United States v. McRae, 702 F.3d 806, 838 (5th Cir. 2012) (same); Hunt, 526 F.3d at 743 (same); Stevens, 771 F. Supp. 2d at 562 (same); Lundergan, 18CR16, 2019 WL 1261354, at *6 (same); United States v. Fumo, 628 F. Supp. 2d 573, 597 (E.D. Pa. 2007) (same); Schock, at *17-*19 (same).[11]

Though the defendant makes a half-hearted effort to claim that he has been arbitrarily chosen for prosecution, as even a cursory review of the Indictment reveals, this is not a case

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[9] Section 1519 is therefore entirely unlike the California statute at issue in Kolender v. Lawson, 461 U.S. 352, 359-60 (1983), which required that individuals who loitered or wandered on the streets provide a "credible and reliable" identification to police to account for their presence, and provided that a failure to do so would be cause for arrest. In that case, the Supreme Court found that the statute "contain[ed] no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification" and therefore the statute vested "virtually complete discretion" regarding the determination of the violation of the statute "in the hands of the police." Id. A violation of Section 1519, by contrast, requires knowledge and proof of a specific intent to impede, obstruct, or influence a federal matter, all of which are well defined legal standards, not subject to the vagaries of individual prosecutors as claimed by the defendant. Doc. 44 passim.

[10] The defendant's citation of instances where mistakes in FEC reporting were handled by the FEC are irrelevant, Doc. 44 at 25-27, and the consistency of interpretation by the courts fatally undercuts the defendant's claims of "divergent applications of law." Id.

[11] The statutory language is clear, and thus, this Court may reject the defendant's reliance on the legislative history to provide a base for his vagueness argument. Hunt, 526 F.3d at 744 (finding that the defendant in that case "[could not] avoid the result compelled by the plain language by selectively citing legislative history"). Moreover, contrary to the defendant's contention, "the production of false financial records by a political campaign" falls within the "financial-fraud" framework contemplated by Congress. Benton, 890 F.3d at 711; cf. Yates, 135 S. Ct. 1074 (finding fish are not a "tangible object" as contemplated by Section 1519, because they cannot be used to "record or preserve information.").

in which the defendant was making good faith efforts to comply with the FEC regulations. As alleged over the course of hundreds of overt acts, defendant was, instead, engaged in an effort to thwart the FEC regulations (and any resulting FBI investigation) by hiding the nature of his misappropriation of donors' contributions for his personal use. Although Hunter may intend to defend against the allegations at trial by claiming that any campaign reporting mistakes he made were innocent ones, his defense does not render Section 1519 unconstitutionally vague on its face; rather, "[t]he problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." Williams, 553 U.S. at 306.

3. The Rule of Lenity Does Not Apply

Finally, this Court should reject the defendant's claim that the rule of lenity prevents the application of Section 1519 to FECA violations. The rule of lenity provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," United States v. Singh, 924 F.3d 1030, 1046 (9th Cir. 2019). But there is no ambiguity in the application of Section 1519 to false financial reporting to the FEC or to impeding or obstructing an investigation of campaign finance impropriety by the FBI. The plain language of Section 1519 reaches knowingly concealing, falsifying, or making a false entry in any "record, document, or tangible object," like FEC reports. The Eighth Circuit in Benton found that the "production of false financial records by a political campaign" clearly fell within the framework envisioned by Congress when it passed Section 1519. 890 F.3d at 711.

Contrary to Hunter's assertions, the United States is not alleging that Section 1519 applies to "any misstatement related to anything that might be regulated by the federal government," but rather that Section 1519 criminalizes Hunter's falsification of his FEC Form 3 Reports, as set forth in Counts 45-57 of the Indictment. Benton, 890 F.3d at 711.

Accordingly, as set forth above, Section 1519 provides a person of ordinary intelligence fair notice of what is prohibited and is not subject to arbitrary or discriminatory enforcement. In particular, the Indictment tracks the language of the statute, and clearly alleges that Hunter "knowingly concealed, covered up, falsified, and made a false entry" in the 13 listed FEC reports, and that he did so, "with the intent to impede, obstruct, and influence the investigation

and proper administration of matters within the jurisdiction of the [FEC] and the [FBI]." Hundreds of overt acts support the allegations. Any additional concerns raised by Hunter over future prosecutions are precisely the type of unmoored "hypothetical situation[s] which cannot establish unconstitutional vagueness." Lundergan, 18CR106, 2019 WL 1261354 at *6. For these reasons, Hunter's vagueness challenge to Section 1519 must be rejected.

IV
CONCLUSION

This Court should deny defendant's Motion To Dismiss Counts 45-57.

DATED: June 28, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, v. DUNCAN D. HUNTER, Defendant.	Case No. 18CR3677-W RESPONSE AND OPPOSITION OF THE UNITED STATES TO DEFENDANT DUNCAN D. HUNTER'S MOTION TO DISMISS COUNTS 58–60

The United States, by and through its counsel, David D. Leshner, Attorney for the United States, and Emily W. Allen, W. Mark Conover, and Phillip L.B. Halpern, Assistant U.S. Attorneys, hereby respectfully submits its opposition to defendant Duncan D. Hunter's Motion To Dismiss Counts 58-60 of the Indictment. Docs. 44 & 44-1.

Counts 58 through 60 allege straightforward violations of a criminal statute that prohibits converting campaign funds to personal use. Hunter's primary contention that he is shielded from prosecution by the internal rules of the House of Representatives lacks merit because the "House Rules" have no bearing on this case. Hunter's additional contentions that the charging statute is unconstitutionally vague and works an unacceptable "chill" on

protected speech, and that charging him violates some unenforceable policy preference for resolving campaign-expenditure violations in a civil setting are similarly meritless.

I

INTRODUCTION

On August 21, 2018, Congressman Duncan D. Hunter ("Hunter" or "the defendant") and his wife, Margaret Hunter, were indicted and charged with one count of conspiracy to commit an offenses, in violation of 18 U.S.C. § 371; 43 counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2; 13 counts of falsification of records related to campaign finance, in violation of 18 U.S.C. §§ 1519 and 2, and three counts of prohibited use of campaign contributions, in violation of 52 U.S.C. §§ 30109(d) and 20114(b)(1) and 18 U.S.C. § 2. On June 13, 2019, Margaret Hunter entered a guilty plea to Count One of the indictment, pursuant to a plea agreement. Trial against Hunter is set to begin on September 10, 2019.

Counts 58, 59, and 60 allege that in the years 2014, 2015, and 2016, respectively, Hunter knowingly and willfully converted more than $25,000 per year to his personal use, each in violation of the Federal Election Campaign Act of 1971 ("FECA" or the "Act"), 52 U.S.C. §§ 30109(d) and 30114(b)(1) (and 18 U.S.C. § 2). In essence the grand jury found that Hunter treated campaign contributions as funds that he could divert to his personal and family life. Seeking now to dismiss Counts 58-60, Hunter contends (i) that prosecution of these counts implicates the internal rules of the House of Representatives (the "House Rules") and so must be barred; (ii) that FECA is unconstitutionally vague; (iii) that prosecution of these counts risks an unacceptable "chill" on First Amendment expression; and (iv) that prosecution of these counts violates a policy preference for civilly adjudicating violations. None of these contentions has any merit, and defendant's Motion To Dismiss Counts 58-60 should be denied.

II

LEGAL STANDARD

Pursuant to Federal Rule of Criminal Procedure 7, an indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). "[A]n indictment or information is sufficient if it 'first, contains the

elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" United States v. Huping Zhou, 678 F.3d 1110, 1113 (9th Cir. 2012) (quoting Hamling v. United States, 418 U.S. 87, 117 (1974)). "A defendant may not properly challenge an indictment, sufficient on its face, on the ground that the allegations are not supported by adequate evidence." United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996) (quoting United States v. Mann, 517 F.2d 259, 267 (5th Cir.1975)). In ruling on a motion to dismiss an indictment for failure to state an offense, like those brought by defendant in this case, "the district court is bound by the four corners of the indictment" and "must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged." United States v. Boren, 278 F.3d 911, 914 (9th Cir. 2002).

III

ANALYSIS

A. The House Rules Have No Relevance to this Prosecution

Counts 58 through 60 of the Indictment charge statutory violations of the Act. Each count alleges that for the years 2014 through 2016 Hunter "knowingly and willfully converted $25,000 and more of Campaign funds to [his] personal use by using them to fulfill personal commitments, obligations, and expenses that would have existed irrespective of [his] election campaign or duties as a holder of federal office" in violation of 52 U.S.C. §§ 30109(d) and 30114(b)(1) and 18 U.S.C. § 2. Ind. at 46–47. Notwithstanding the plain language of the Indictment, Hunter seeks to recast these charges as an "attempt to prosecute [him] for a violation of Congress'[s] own internal rules." Doc. 44 at 7. Yet, the House Rules are neither referenced in the Indictment, nor relied upon as the basis of these charges. In fact, the United States does not expect to address the application or interpretation of House Rules during trial. The House Rules are, irrelevant to the straightforward prosecution of Hunter's violations of the Act, and as such, defendant's meritless defense should be denied.

As a general matter, the Rulemaking Clause of the Constitution provides the House of Representatives with the prerogative to set rules governing the conduct of its members. U.S.

Const. Art. 1, § 5, cl. 2. In United States v. Rostenkowski, 59 F.3d 1291, 1305 (D.C. Cir. 1995)—the principal authority cited by Hunter—a congressman was charged with defrauding the United States and the House of Representatives by taking fraudulent advantage of the House Finance Office (a payroll scheme and a vehicle scheme), the House Office Supply Service (a stationary-store scheme), and the House Post Office (a postage scheme). As these schemes directly implicated the defendant's use of congressional services—matters covered by the House Rules—the D.C. Circuit held that the United States would "almost certainly rely upon the House Rules" as evidence of the defendant congressman's state of mind. Proceeding from this premise about the likely trial evidence, the D.C. Circuit held that because the House Rules are committed to the Legislative Branch, separation-of-powers concerns precluded the Judicial Branch from construing them unless they were sufficiently clear. Id. at 1306. The D.C. Circuit then undertook a count-by-count assessment to pare back counts that would have required the use of "non-justiciable" House Rules as evidence. Id. at 1307–13. Based on this analysis, Hunter contends that Counts 58-60 potentially raise the specter of the "House Rules" – without actually citing or referencing them – and so contends that those charges are non-justiciable, like those in Rostenkowski, and should be dismissed. His contention is wrong.

Assuming some remaining doctrinal vitality of Rostenkowski,[1] Hunter's reliance on it is meritless because he is being prosecuted for a violation of a criminal law, not a House Rule.

[1] To be sure, Rostenkowski is an outlier decision that is in tension with Supreme Court precedent permitting the Judiciary to construe the rules of Congress. Yellin v. United States, 374 U.S. 109, 114 (1963) ("It has been long settled . . . that rules of Congress and its committees are judicially cognizable."). Nor are courts precluded from permitting such congressional rules to be evidence at trial. Id. at 114–24 (reversing conviction for refusing to answer a House committee's questions where the committee did not abide by its own rules regarding non-public hearings); Christoffel v. United States, 338 U.S. 84 (1949) (reversing conviction for perjury before a House committee where the defendant was not allowed to show that the committee lacked a quorum). Recently, in United States v. Schock, 891 F.3d 334, 336–37 (7th Cir. 2018) (Easterbrook, J.), the Seventh Circuit noted that the holding in Rostenkowski "does not represent established doctrine" and questioned why judicial review of House Rules would be any different from review of enacted legislation or administrative rules promulgated by the

United States v. Diggs, 613 F.2d 988, 1001 (D.C. Cir. 1979) (noting that the Rulemaking Clause "does not immunize a member of Congress from the operation of the criminal laws"). As numerous cases have observed, prosecutions that do not turn on any House Rule, or internal rule of the Senate, are unimpacted by the holding in Rostenkowski. In United States v. Durenberger, 48 F.3d 1239, 1243 (D.C. Cir. 1995), for example, the D.C. Circuit rejected the argument that the Senate's internal rules posed a bar to prosecution of a senator who was accused of making false statements because the proof turned on the statements and the senator's knowledge of their falsity, not the application of any internal rule. Likewise, in United States v. Schock, 16CR30061, 2017 WL 4780164 at *4–13 (C.D. Ill. Oct. 23, 2017), the district court concluded that the House Rules posed no bar to prosecuting a congressman for multiple counts of wire fraud, mail fraud, and false statements because the United States did not need to rely on the House Rules to prosecute violations of those statutes.[2] In United States v. Bowser, 318 F. Supp. 3d 154, 172 (D.D.C. 2018), the district court similarly concluded that the House Rules had no bearing on a false-statements prosecution because the proof had no relationship to the application of any House Rule. See also United States v. Menendez, 831 F.3d 155, 174–75 (3d Cir. 2016) (holding in the context of the Speech and Debate Clause that internal Senate rules did not bar a federal bribery prosecution not implicating such a rule).

Like Hunter's case, each of the foregoing cases—which charged violations of wire fraud, mail fraud, and false statements, among other criminal violations—did not turn on the application or interpretation of any House or Senate Rule, and as such Rostenkowski stood as no obstacle to the criminal prosecution. So too here, for the inapplicability of the House Rules is evident from the four corners of the Indictment. Neither Counts 58 through 60, nor any other allegation in the Indictment, makes reference to any House Rule. Of the hundreds of

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Executive Branch. The Ninth Circuit has yet to weigh in, and this Court need not either, because, as described below, this case does not implicate any House Rule.

[2] On appeal from the defendant's motion to dismiss, the Seventh Circuit observed: "Neither the separation of powers generally, nor the Rulemaking Clause in particular, establishes a personal immunity from prosecution or trial." Schock, 891 F.3d at 337.

paragraphs of alleged overt acts, none so much as cite a House Rule. Likewise, at trial, the United States expects that the application or interpretation of the House Rules will form no part of the jury instructions.[3] Defendant's protestations to the contrary, the House Rules are irrelevant to this case, as is the decision in Rostenkowski, and for that matter the Rulemaking Clause of the Constitution.

Most tellingly, not even Hunter—who asks to be shielded from prosecution by the House Rules—can cite even a single House Rule in support of his motion. Instead, he confusingly cites an administrative regulation of the FEC, an executive-branch agency. Doc. 44 at 9–11 (citing passim 11 C.F.R. § 113.1(g)(1)). Whatever use Hunter intends to make of FEC regulations at trial, administrative regulations of an executive-branch agency are not House Rules, and Hunter cannot rely on them to protect him from prosecution.[4] Indeed it is implausible that a member of Congress could invoke the Rulemaking Clause to cover any government pronouncement—legislative, executive, or judicial—to shield himself from the law. To accept that premise is to accept the nonsensical idea that Hunter's elected status immunizes him from prosecution. That is not the law. Diggs, 613 F.2d at 268 ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.") (quoting United States v Lee, 106 U.S. 196, 220 (1882)). Hunter's failure to invoke a House Rule in his own defense, let alone identify one that is germane to the prosecution by the United States, is fatal to his motion.[5]

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[3] Instead, the evidence of Hunter's conversion of campaign funds to his personal use will be familiar: communications among co-conspirators, financial records, and testimony of campaign operatives and people familiar with his improper spending.

[4] Given that Hunter has directed this Court to an FEC regulation, his hypothetical arguments applying that regulation to payments to his wife and his golf outings offer no support for his argument that the Rulemaking Clause bars his prosecution in this case.

[5] If the Court finds that Hunter can properly invoke the Rulemaking Clause, he cannot do so in a motion to dismiss, for he is in substance asking this Court to assess the possible evidence against him rather than the legal sufficiency of the Indictment. Jensen, 93 F.3d at 669; Boren, 278 F.3d at 914. Whatever the law on Rule 12(b)(3)(B) may be in the D.C. Circuit,

B. The Act Poses No Vagueness Problems

Hunter next contends that Counts 58–60 must be dismissed because the Act prohibits him from spending campaign funds for obligations that would exist "irrespective of" his membership in Congress, a standard Hunter argues is unconstitutionally vague. Contrary to Hunter's claim, however, the statutory language of the Act is sufficiently definite to provide a person of ordinary intelligence fair notice of what is prohibited. Accordingly, Hunter's vagueness challenge to FECA (like his challenge to Section 1519) must be rejected.

1. Hunter Cannot Mount a Viable Facial Challenge

Hunter suggests that the Act is facially vague because enforcement "risks a chilling effect on First Amendment activity by legislators across the country." Doc. 44 at 12, 16. Hunter's claim to a "facial challenge" rests on the Supreme Court's admonition that statutes implicating constitutionally protected activity are subject to closer scrutiny. Holder v. Humanitarian Law Project, 561 U.S. 1, 19 (2010); Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 495 (1982). But, the Supreme Court has also explained that in the absence of constitutionally protected activity, vagueness challenges are considered "as applied to the particular facts at issue, for a plaintiff who engaged in some conduct that is clearly proscribed cannot complaint of the vagueness of a law as applied to the conduct of others." Humanitarian Law Project, 561 U.S. at 19. Or as the Ninth Circuit has explained, "[e]ven when a challenger brings a facial challenge to a statute that is claimed to interfere with the challenger's right of free speech or of association where a more stringent vagueness test should apply, speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended application." United States v. Evans, 883 F.3d 1154, 1166 (9th Cir. 2018) (internal citations and quotations omitted); see also United States v. Mazurie, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in

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it is plain from Rostenkowski that the D.C. Circuit undertook a pretrial analysis of likely evidence, trimming the Indictment to reflect its views on potentially applicable House Rules. 59 F.3d at 1307–13. This is impermissible in the Ninth Circuit.

the light of the facts at hand."). Here, Hunter cannot pursue a facial challenge to FECA because he cannot identify a valid First Amendment interest.

Charging Hunter with the conversion of campaign funds infringes no constitutionally protected activity. His argument has been considered and rejected. In Federal Election Commission v. Craig for U.S. Senate, 816 F.3d 829, 848–49 (D.C. Cir. 2016), the D.C. Circuit rejected a former senator's claim that a court order to disgorge funds he had converted to personal use infringed upon the First Amendment, holding that "[t]he court's order does no more than enforce the obligation of a campaign committee to follow laws that are unrelated to the restriction of free expression." The holding in Craig for U.S. Senate echoes the principle espoused by the Supreme Court, that "the First Amendment does not shield fraud."[6] Illinois ex rel. Madigan v. Telemarking Assocs., Inc., 538 U.S. 600, 612 (2003). Indeed, the Court has observed that the Government has long had a "firmly established" power to "protect people against fraud," Donaldson v. Read Magazine, 333 U.S. 178, 198 (1948) (reaffirming validity of mail-fraud statute), and even when it has found untruthful statements to be protected speech, it has taken care to observe that falsity associated with fraud is not so protected. United States v. Alvarez, 567 U.S. 709, 718–19 (2012).

Contrary to Hunter's protestations, the grand jury indicted him because he converted campaign funds to his personal use, not because of any purported expenditures having some connection to a "political purpose." Doc. 44 at 17. Simply put, Hunter is charged with committing fraud by using his campaign's money as though it were his own. The First Amendment has nothing to offer him in the face of that conduct, and so his facial challenge fails.

[6] Hunter cites no authority for the suggestion that his conduct is protected speech. He relies on Buckley v. Valeo, 424 U.S. 1 (1976) and Kolender v. Lawson, 461 U.S. 352 (1983), though neither suggests that the conversion of campaign funds is protected speech. Buckley focuses on whether campaign contributions are "speech" and can be regulated, and Kolender focuses on a vagrancy-mitigation statute that has nothing to do with campaign finance, elections, legislating, or any other function relevant to Hunter's speech as a legislator.

2. Hunter's Remaining "As-Applied" Challenge Is Meritless

Hunter's remaining as applied challenge is meritless because the Act is clear and definite and contains a significant enforcement standard. In general, "[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Williams, 553 U.S. 285, 304 (2008); United States v. Wyatt, 408 F.3d 1257, 1260 (9th Cir. 2005) ("[A] statute is void for vagueness if . . . the statute (1) does not define the conduct it prohibits with sufficient definiteness, and (2) does not establish minimal guidelines to govern law enforcement."). Here, the Act provides a straightforward test for assessing whether conversions are improper, which is further supplemented by a list of statutory examples. That the Act imposes liability only for "knowing and willful" violations reinforces its vitality.

a. The Act is Clear and Definite

Hunter contends that the Act does not provide "reasonable notice" of the conduct that it prohibits because it uses an "irrespective test" to define improper conversions. Doc. 44 at 16. Yet commonsense alone supplies the meaning: A candidate or office-holder cannot knowingly and willfully use campaign funds for a "commitment, obligation, or expense" that he would incur, were he not a candidate or office-holder. 52 U.S.C. § 30114(b). The Ninth Circuit has taken a pragmatic approach to discerning whether a statute is reasonably clear, see e.g., United States v. Williams, 441 F.3d 716, 724–25 (9th Cir. 2006), and that kind of consideration makes this case an easy one.[7] As alleged in the Indictment, Hunter made patently improper use of his campaign funds for things like vacations, tuition, clothing, food, and entertainment. 52 U.S.C. § 30114(b)(2); see United States v. National Dairy Prods. Corp., 372 U.S. 29, 32–33 (1963) (determining the sufficiency of a statute in the light of the conduct with

[7] In Williams, 441 F.3d at 724–25, the Ninth Circuit rejected a challenge to a fraud statute because the defendant, a financial advisor, could reasonably understand that his use of the mails and wires to defraud an old man was unlawful. So too here. Hunter, a congressman, could reasonably understand that donations to his campaign were not his to use as his own.

which a defendant is charged). Hunter had reasonable notice that these conversions of campaign funds were improper, because his use of the funds had no plausible relationship to his status as a candidate or officeholder; or, in other words, that the expenditures were made "irrespective" of his candidacy and membership.

In addition to the plain meaning of the statute, the Act supplements it with a statutory list of commitments, obligations, or expenses that constitute improper conversions. In other contexts, the Ninth Circuit has observed that the presence of supplemental guidance provides legally significant clarity to a statute. United States v. Harris, 705 F.3d 929 (9th Cir. 2013) (rejecting vagueness challenge to the definition of a "dangerous weapon" because the defendant was able to observe signage making clear what was prohibited); United States v. Sandsness, 988 F.2d 970, 971 (9th Cir. 1993) (rejecting vagueness challenge to a federal drug statute that prohibits sales of "drug paraphernalia" because the statute provided factors and examples to identify the items that were prohibited). Here, the Act identifies (i) clothing purchases; (ii) vacations and non-campaign related trips; (iii) household food items; (iv) tuition payments; and (v) sporting or entertainment events as improper conversions. In turn, the Indictment alleges that Hunter converted campaign funds to these uses. 52 U.S.C. § 30114(b)(2). In this case, the statutory list of examples additionally defined the prohibited conduct with sufficient definiteness, thus providing Hunter with adequate notice that his conduct was improper.

b. The Act Contains Meaningful Standards

In the portion of his brief addressing vagueness, Hunter contends that the Act lacks "sufficient guideline[s] to govern its enforcement." Doc. 44 at 16. But as he elsewhere concedes, the Act contains a "knowing and willful" scienter requirement, which limits enforcement to egregious violations of the Act. Here too, Hunter's contention is meritless.

To begin, the Act requires proof that the conversions comprised more than $25,000, a baseline dollar amount for the United States to prove. From this (as noted above), the Act contains statutory examples that, while not exclusive, provide important context to the Act and likely limit its enforcement to clear-cut examples of Hunter's improper conversions. To

demonstrate Hunter's guilt, the United States must additionally prove he committed these offenses "knowingly and willfully," as the Indictment charges.[8] 52 U.S.C. § 30109(d). The presence of this mens rea requirement undermines any concerns about a lack of a standard, for enforcement is limited to purposeful offenders. Am. Telephone & Telegraph Co. v. United States, 299 U.S.232, (1936) (Cardozo, J.) (rejecting a vagueness challenge and observing that "since the statutes require a specific intent to defraud in order to encounter their prohibitions, the hazard of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such a requirement"). When a criminal statute contains such a mens rea, the Ninth Circuit has rejected vagueness challenges because enforcement is limited to purposeful offenders. Wyatt, 408 F.3d at 1261 (presence of scienter requirement "can help a law escape a vagueness problem); United States v. Makowski, 120 F.3d 1078, 1081 (9th Cir. 1997) (rejecting vagueness because the language of the statute "leaves little doubt that a defendant will be convicted . . . only where he has the specific intent" to commit the offense); Hanlester Network v. Shalala, 51 F.3d 1390, 1398 (9th Cir. 1995) (anti-kickback statute is not vague because it has a scienter requirement). Taken together, the clear statutory text, the supplemental list of examples, and the scienter requirements provide ample notice of what conduct is condemned and rigorous standards to ensure only culpable conduct is punished. For these reasons, defendant's vagueness challenge withers.

[8] Hunter himself concedes too much. Though he claims that the statute contains no standards and invites arbitrary enforcement, he also admits that "Congress reserved criminal enforcement of the election law only for the most culpable acts by, among other steps, requiring the most demanding mens rea for criminal FECA violations." Doc. 44 at 13. Hunter is correct: Unless the United States can prove that he converted campaign funds knowingly and willfully, it will not be able to prove that he is guilty of violating the Act. But, in turn, that concession confirms the basic point that the Act is far from indiscriminate. Hunter's own characterization of the Act fatally undermines his argument.

C. There is no Preference for Civil Enforcement of the Act

Finally, Hunter protests prosecution under the Act because, he claims, Congress has expressed a preference for not criminally prosecuting violations of the Act. Contrary to Hunter's contention, there is no "preference" for civil adjudication of violations of the Act.

The Act is agnostic about civil or criminal enforcement. It "imposes substantial civil and criminal penalties for violations of its provisions and contains elaborate enforcement mechanisms leading to their imposition." Martin Tractor Co. v. Fed. Election Comm., 627 F.2d 375, 382 n.26 (D.C. Cir. 1980). On the civil-enforcement side, the FEC works towards "conciliation agreements" with offenders, and may seek penalties through the agreements or subsequent enforcement actions. Id.; see also 52 U.S.C. § 30109(a)(4). On the criminal-enforcement side, the FEC may refer "knowing and willful violations" to the Attorney General for prosecution. Martin Tractor, 627 F.3d at 382 n.26; see also 52 U.S.C. § 30109(a)(5)(B). Or the Department of Justice may simply initiate criminal proceedings. Marcus v. Holder, 574 F.3d 1182, 1184 (9th Cir. 2009); United States v. Int'l Un. of Operating Engs, Local 701, 638 F.2d 1161, 1163 (9th Cir. 1979) ("Nothing in the Act suggests, much less clearly and ambiguously states, that action by [DOJ] to prosecute a violation of the Act is conditioned upon prior consideration of the alleged violation by the FEC."); Fieger v. U.S. Attorney Gen., 542 F.3d 1111 (6th Cir. 2008); Bialek v. Mukasey, 529 F.3d 1267 (10th Cir. 2008). Whether and how to implement these options is up to the FEC and the Department of Justice.

While Hunter couches his argument as the United States contravening a "preference" for civil enforcement, his argument is the same as those advanced in Local 701 and Marcus—that the FEC has enforcement priority over the Department of Justice. It does not. Rather, as these cases hold, the Attorney General has independent discretion to enforce the criminal provisions of the Act, which the Department of Justice has exercised in this case.

IV

CONCLUSION

This Court should deny Hunter's Motion To Dismiss Counts 58 through 60.

DATED: June 28, 2019

Respectfully Submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DUNCAN D. HUNTER, Defendant.	Case No. 18CR3677(1)-W GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO RECUSE THE UNITED STATES ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF CALIFORNIA Date: July 1, 2019 Time: 10:00 a.m.

Hunter's motion to dismiss the indictment or recuse the U.S. Attorney's Office is an attempt to distract from the evidence against him. Even if prosecutors had attended a Clinton event to support the then-candidate, Hunter's motion does not establish a rational reason to think any prosecutor harbors inappropriate personal feelings about *him*, or is motivated by anything besides legitimate prosecutorial considerations. Hunter's leap of logic is flawed, and the motion should be denied.

I.

STATEMENT OF FACTS

In August 2015, the U.S. Secret Service extended a routine invitation to three career federal prosecutors at the U.S. Attorney's Office to attend an event at which the agency was providing protective service. The fundraising event was at a private home for then-candidate for President, Hillary Clinton. Their attendance was spurred and initiated entirely by the Secret Service.[1]

The U.S. Secret Service publicly said it regularly asks federal prosecutors around the country to attend "protective mission events" in case incidents arise for which legal guidance is needed.[2] The Secret Service said it has a "long standing practice of facilitating photograph opportunities [with its protectees] for our emergency service and law enforcement partners which would include the U.S. Attorney's Office." *Id.*[3]

II.

ANALYSIS

A. Defendant's Motion to Dismiss or, in the Alternative, to Recuse the USAO

Defense counsel has been fully aware of the circumstances of this Secret Service event throughout his representation of Hunter. Defense counsel has litigated important issues

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[1] Although there is no evidence to suggest the prosecutors' attendance at this event was for political purposes, defendant argues that simply attending at the request of Secret Service is a partisan political activity. However, the Secret Service invitation was extended without any regard to the political preferences of the U.S. Attorney's Office or the prosecutors who ultimately attended. Indeed, the Secret Service routinely invites prosecutors to attend similar gatherings and events on both sides of the political spectrum.

[2] Kristina Davis, S.D. UNION-TRIB., Secret Service explains why San Diego prosecutors were invited to Clinton fundraiser, Aug. 24, 2018, available at https://www.sandiegouniontribune.com/news/courts/sd-me-secret-service-20180824-story.html.

[3] Hunter's excitement about an email indicating prosecutors were given that photo opportunity, Mtn. 8-9, is strange considering the Secret Service openly said that 11 months ago. Hunter conveniently omits that part of the agency's statement from his motion.

relating to attorney conflicts, matters of evidentiary privilege, and the motion to compel subpoena production, all without raising any complaints of bias with the Court.

Without anything other than defendant's own accusation to suggest that the prosecutors in this case are anything but neutral and detached about Hunter, he now says the prosecutors "undeniabl[y]" attended the event as "supporters of celebrity candidate Clinton" which, because Hunter endorsed her opponent and two of the prosecutors have played roles in his case, establishes "a glaring conflict of interest and loss of impartiality" in his prosecution that requires dismissal of the indictment or recusal of the U.S. Attorney's Office. Mtn. 5, 9, 11, 13.

B. Legal Standard

a. Legal Standard Regarding Dismissal of the Indictment

Prosecutors must be "disinterested," *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987), but "need not be entirely 'neutral and detached.'" *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) ("In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law").

Courts have consistently required a showing of some improper motive before finding a prosecutor has an conflict of interest. The few cases when a prosecutor was not sufficiently disinterested generally had attorneys in civil matters simultaneously prosecuting related criminal cases. *Young*, 481 U.S. at 808; see also *Crowe v. Smith*, 151 F.3d 217, 227-29 (5th Cir. 1998); *United States ex rel. S.E.C. v. Carter*, 907 F.2d 484 (5th Cir. 1990) (special prosecutors for criminal contempt were same SEC attorneys who obtained civil injunction which defendants violated); *Hughes v. Bowers*, 711 F. Supp. 1574, 1581-84 (N.D. Ga. 1989) (special prosecutor also represented victim's family in insurance claim); *Ganger v. Peyton*, 379 F.2d 709, 711-15 (4th Cir. 1967) (prosecutor "represented Ganger's wife in the prosecution of a divorce action which was pending at the time of the criminal trial and was based upon the same alleged assault on Mrs. Ganger").

A few defendants have tried to push the disinterested prosecutor rule beyond actual conflicts or simultaneous representation. They failed. See, e.g., *United States v. Wallach*, 935

F.2d 445, 459-60 (2d Cir. 1991) ("The only case law that defendants rely on ... involves individual prosecutors who were discovered to have had an actual interest in the outcome of a case"; no showing prosecutors biased because investigation encompassed then-Attorney General); see also *United States v. Farias*, 836 F.3d 1315, 1326 (11th Cir. 2016) (involvement of tobacco companies in cigarette trafficking investigation insufficient to show prosecutor biased to help companies); *United States v. Terry*, 17 F.3d 575, 579 (2d Cir. 1994) (Attorney General's commercials touting battle against "anti-abortion extremists" insufficient to establish personal bias against founder of pro-life organization).

b. Legal Standard for Recusal of the U.S. Attorney's office

Hunter requests "recusal" of the U.S. Attorney's office if dismissal fails. Mtn. 12-13. Yet the only authority he cites is the "United States Attorney's Manual." Mtn. 12 (Now at Justice Manual, 3-1.140.) The manual is Department guidance only, JM 1-1.200, and unenforceable by courts. *United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000) ("several courts, including this circuit, have consistently held that these guidelines do not create any rights in criminal defendants").[4]

Apart from the Justice Manual, federal appellate courts uniformly have rejected efforts to disqualify entire offices. *United States v. Bolden*, 353 F.3d 870, 879 (10th Cir. 2003) ("every circuit court that has considered the disqualification of an entire United States Attorney's office has reversed the disqualification"). Even individual disqualification of specific prosecutors, which the motion does not seek, "is a drastic measure [that] a court should

[4] For what it is worth, the guidance was followed. Despite knowing for three years that prosecutors were at the Clinton event and litigating or raising several other issues in the interim, Hunter's counsel waited until the eve of indictment to complain to the then-United States Attorney, General Counsel at the Executive Office for United States Attorneys, and the Office of the Deputy Attorney General (ODAG), that the U.S. Attorneys office must be recused—almost as if the request was sought to throw the case off track and not out of real concern for the evenhandedness of the prosecution. Each still considered his complaint. None thought recusal appropriate. The Office of the Attorney General was told of ODAG's decision and the circumstances and declined a fourth level of review.

hesitate to impose … except where necessary." *Id.* (internal quotation marks omitted). The recusal motion should be denied.

C. Dismissal is Unwarranted

Hunter moves to dismiss the indictment based on faulty logic that if prosecutors attend a fundraiser for a candidate on one side of the political spectrum, they then are barred from prosecuting a defendant on the other side of the political spectrum. This unsound thinking driving Hunter's motion to dismiss is contrary to the law.[5]

First, there is no support for Hunter's conclusion that prosecutors in this case supported Clinton. The Secret Service answered Hunter's accusations in the media by publicly saying it "regularly requests representation" by federal prosecutors "around the country during protective mission events." [6] From the agency's perspective the "in-person representation provides for, and facilitates, real-time direct communications in the event of a protective security related incident where immediate prosecutorial guidance could be necessary." *Id.* An element of relationship and rapport-building with other agencies doubtless exists too. That is why the Secret Service said it has a "long standing practice of facilitating photograph opportunities [with its protectees] for our emergency service and law enforcement partners which would include the U.S. Attorney's Office." *Id.*

Second, suppose prosecutors had attended a fundraiser to support a candidate. At most that shows they support the candidate. That does not mean they think anything about a different politician with different views much less a lower profile one who is not the candidate's

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[5] To accept Hunter's argument would mean that no presidentially appointed U.S. Attorney or the office they oversee could prosecute someone of a different political party. All presidentially appointed U.S. Attorneys at some point meet with the President (and almost always take photographs with the President), are political appointees, and serve at the pleasure of the President. Hunter's argument would require U.S. Attorneys and their offices to be recused from prosecuting anyone in an opposing party as they would have an even greater "glaring conflict of interest and loss of impartiality that is intended to separate federal prosecutors from politically influenced decisions." Mtn. 9

[6] *See* Kristina Davis, S.D. UNION-TRIB., Secret Service explains why San Diego prosecutors were invited to Clinton fundraiser, Aug. 24, 2018.

election opponent. Politics are not binary or all-encompassing. Reasonable people know support for one does not unavoidably mean or require hostility towards someone else. Even if prosecutors had attended a Clinton event to support the then-candidate (which stripped bare is what Hunter alleges), Hunter's motion does not establish a rational reason to think any prosecutor harbors inappropriate personal feelings about *him*, serves conflicting masters, or is motivated by anything besides legitimate prosecutorial considerations, let alone at a level that requires dismissal of the charges. The motion to dismiss the indictment should be denied based upon this reasoning alone.

Third, Hunter does not contend the prosecutors in this case also represent clients in related civil matters or have a financial interest in the outcome; they do not. Hunter block quotes part of *Young* and says his case "comes squarely within th[at] reasoning." Mtn. 11. It is hard to see how. The prosecutors for Young's criminal contempt case were the same private attorneys who obtained the civil injunction that Young violated. The attorneys stood to win liquidated damages in the civil case if the violation was proved which "had the potential to influence whether Young was selected as a target of investigation [in the criminal case], whether he might be offered a plea bargain, or whether he might be offered immunity in return for his testimony." 481 U.S. at 806. Young also had sued the attorney-prosecutors for defamation. That "created the possibility that the [contempt investigation] might be shaped in part by a desire to obtain information useful in the defense of the defamation suit." *Id.* And the contempt investigation "theoretically" could have been used "to gather information of use" in "various civil claims [still] pending." *Id.*

This obviously is not *Young*. The criminal prosecutors there stood to gain financially in related civil proceedings which "at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety." *Id.* The long passage quoted by Hunter's motion assumes that point when speaking about the dangers of an "interested prosecutor." The career prosecutors in this case do not represent other clients who can benefit from Hunter's prosecution. They are not "interested." The cart is before the horse. Hunter's attempt to equate the facts of *Young* to the facts of this case is misplaced.

D. Recusal in any Form is Unwarranted

Hunter engages in the same logical fallacy that he concocted to seek dismissal of the indictment, in an attempt to manufacture a basis for recusal. [7]

Without citing to any facts, Hunter says the prosecutors are supporters of Clinton which establishes "a glaring conflict of interest and loss of impartiality" in his prosecution that requires recusal of the entire U.S. Attorney's Office. Mtn. 13.

First, again, even assuming prosecutors had attended a Clinton fundraiser to support her as a candidate, that does not mean they harbor inappropriate personal feelings about Hunter or are motivated by anything besides legitimate prosecutorial considerations, let alone to the level that requires recusal of an entire office. Support for one candidate does not create a loss of impartiality against another politician simply because they are a member of a different political party.

Second, as described above, the prosecutors were not there to support Clinton and certainly not because of distaste for Hunter. Attending a political event at the request of Secret Service does not equate to support for the candidate. [8]

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[7] Hunter sets forth a false dichotomy related to the nexus between Clinton and Hunter. Hunter's argument is that a prosecutor who attends a Clinton event (even at the request of Secret Service) must support Clinton, a Democrat, and therefore must hold animus towards Hunter, a Republican, and therefore can't prosecute Hunter. This logic would require any judge who supported Clinton to recuse from any case involving a Republican, particularly since the recusal standard based on appearance of partiality is more stringent for judges than prosecutors. *See Marshall*, 446 U.S. at 248; Cf. *United States v. Lauersen*, 348 F.3d 329, 334 (2d Cir. 2003) (recusal standard for federal judges based on appearance of partiality is whether "an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubt that justice would be done absent recusal")

[8] A footnote in the motion says Hunter made a FOIA request to the Department of Justice that has gone unanswered. Mtn. 8 n.7. Discovery in federal criminal cases is dictated by Fed. R. Crim. P. 16. FOIA does not supplement or override the rule. Hunter is not entitled to more than he could get through Rule 16. *United States v. U.S. Dist. Court, Cent. Dist. Of Cal.*, 717 F.2d 478 (9th Cir. 1983).

A second footnote in the motion requests "the entire un-redacted email" quoted in Hunter's motion (which he obtained through FOIA), as well as "all internal Department of Justice notes, memorandums or communications either written or oral between members of

the United States Attorney's Office." Mtn. 11-12 n.8. Hunter cites no authority for this request. That is reason enough to reject it. Cf. *Hamilton v. Southland Christian School, Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) ("A passing reference to an issue in a brief is not enough, and the failure to make arguments and cite authorities in support of an issue waives it.").

Fed. R. Crim. P. 16(a)(1)(E)(i) seems to be the only authority that superficially could cover this. The provision requires disclosure of documents "material to preparing the defense." But the rule runs into three problems here. One is materiality. For the reasons described above, papers establishing prosecutors attended to support Clinton would not make Hunter's point. A second is the Supreme Court says "defense" in this Rule means information bearing on "'shield' claims, which refute the Government's arguments that the defendant committed the crime charged." *United States v. Armstrong*, 517 U.S. 456, 462 (1996). "Defense" does not "include[] any claim that is a 'sword,' challenging the prosecution's conduct of the case." *Id*. (rejecting Rule 16 as a basis for ordering discovery related to selective-prosecution argument); *but compare United States v. Soto-Zuniga*, 837 F.3d 992, 1000-01 (9th Cir. 2016) ("In our view, the holding of *Armstrong* applies to the narrow issue of discovery in selective-prosecution cases.") *with United States v. Chon*, 210 F.3d 990, 995 (9th Cir. 2000) (applying *Armstrong* to deny discovery request under Rule 16 outside selective prosecution context). Hunter seeks the information for the second (banned) purpose, not the first. The third obstacle is Fed. R. Crim. P. 16(a)(2). That subsection trumps 16(a)(1)(E) and excludes from discovery "internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case"—in other words, anything written covered by the latter part of Hunter's request demanding documents and communications between government attorneys about this issue. For all of these reasons, this request should be denied.

III.

CONCLUSION

Defendant has failed to establish any actual or apparent conflict of interest or loss of impartiality, and his motion to dismiss the indictment or, in the alternative, to recuse the United States Attorney's Office should be denied.

DATED: June 28, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DUNCAN D. HUNTER, Defendant.	Case No. 18CR3677(1)-W **UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE**

Defendant Duncan D. Hunter ("Hunter" or "the defendant") asks this Court to transfer the case to a different venue. Doc. No. 37 ("Def. Mtn."). To grant such a request prior to trial, the Court must find presumptive prejudice—that is, that the district has been so saturated with negative publicity against him, its effect "renders it impossible to empanel an impartial jury."

Hunter makes no such showing. Where disgraced CEOs, terrorists, Watergate conspirators, and drug lords have failed, Hunter offers only a half-dozen news articles and editorials, and backs up his request with completely irrelevant presidential election results. Worse still, he demands the Court transfer the case to a non-adjacent district for no other

reason than that then-presidential candidate Donald J. Trump fared better there than in this district in the 2016 presidential election. The Court should deny such an extraordinary request based on such unprecedented reasoning. This case should be tried in this district.

I.
BACKGROUND

Hunter's Motion requests a change of venue, and specifically demands that the Court transfer his case to Eastern District of California. To support his argument that he cannot receive a fair trial in this district, Hunter cites to six articles and editorials published by the San Diego Union-Tribune, and a single political cartoon. Def. Mtn. at 2, 3, 5. Only two, an editorial and the political cartoon, were published after August 23, 2018, and after he was reelected to Congress on November 6, 2018 (a reelection that he won, after indictment, by a majority vote in California's 50th House District,[1] most of which is located within the Southern District of California[2]). Hunter provides no evidence of how pervasively these seven publications have been consumed or even noticed by the jury pool, nor does he produce any evidence of the affect these publications have had on potential jurors' sentiments towards him. In support of his request to send this trial to the Eastern District of California, Hunter cites to the percentage of votes Donald J. Trump carried vis-à-vis Hillary Clinton in just three of the Eastern District's 34 counties. Def. Mtn. at 3.

II.
ANALYSIS

A. This Case Does Not Present the "Rare" and "Extreme" Scenario of a Jury Pool Presumptively Prejudiced by Inflammatory and Prejudicial Media Coverage

1. Legal Principles

"The standards governing a change of venue ultimately derive from the Due Process Clause of the Fourteenth Amendment which safeguards a defendant's sixth amendment right

[1] https://www.nytimes.com/elections/results/california-house-district-50

[2] https://en.wikipedia.org/wiki/California%27s_50th_congressional_district

to be tried by 'a panel of impartial, 'indifferent" jurors.'" *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1989) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)). The Ninth Circuit "ha[s] identified two different types of prejudice in support of a motion to transfer venue: presumed or actual." *Hayes v. Ayers*, 632 F.3d 500, 508 (9th Cir. 2011) (internal quotations omitted). Interference with a defendant's fair-trial right "is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Harris*, 885 F.2d at 1361. Actual prejudice, on the other hand, exists when voir dire reveals that the jury pool harbors "actual partiality or hostility [against the defendant] that [cannot] be laid aside." *Id.* at 1363. Screening questionnaires and voir dire are normally sufficient to "detect and deter juror bias" and ensure a fair trial. *See Skilling v. United States*, 561 U.S. 358, 385 (2010).

Because actual prejudice can only exist after voir dire demonstrates a jury pool's irreversible prejudice against a defendant, the only issue before the Court at this juncture concerns whether Hunter's right to a fair trial is presumptively prejudiced.

Presumptive prejudice is an extremely high barrier for Hunter to cross. "The presumed prejudice principle is rarely applicable and is reserved for an extreme situation." *Harris*, 885 F.2d at 1361 (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976) (citation and internal quotation marks omitted)). The Supreme Court has explained that a court may presume prejudice only when the "trial atmosphere [is] utterly corrupted by press coverage," *Dobbert v. Florida*, 432 U.S. 282, 303 (1977) (citing *Murphy v. Florida*, 421 U.S. 794, 798 (1975)), or when "a wave of public passion…ma[kes] a fair trial unlikely by the jury[.]" *Patton v. Yount*, 467 U.S. 1025, 1040 (1984) (internal quotation marks omitted). In deciding whether a change of venue is necessary, the Ninth Circuit typically considers three factors:

> whether there was a "barrage of inflammatory publicity immediately prior to trial amounting to a huge…wave of public passion," whether the media accounts were primarily factual or editorial in nature, and whether the media accounts "contained inflammatory, prejudicial information that was not admissible at trial."

Randolph v. California, 380 F.3d 1133, 1142 (9th Cir. 2004) (quoting *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998)). The adverse publicity must rise to such a pervasive and inflammatory level "that jurors cannot be believed when they assert that they can be impartial." *United States v. Croft*, 124 F.3d 1109, 1115 (9th Cir. 1997).

2. Hunter Fails to Demonstrate a "Barrage" of Negative Coverage

"Juror exposure to news reports of a crime—even 'pervasive, adverse publicity'—is not enough alone to trigger a presumption of prejudice to the defendant's due process rights." *Skilling*, 130 S. Ct. at 2916 (describing the "vivid, unforgettable" and "blatantly prejudicial" information at issue in the handful of cases in which the Supreme Court has presumed prejudice as a result of pretrial publicity).

Hunter's motion is long on superlatives and short on supporting facts. While he references "enormous negative local media coverage," Def. Mtn. at 1, he cites roughly a half-dozen editorials, by a single newspaper, the San Diego Union-Tribune. This falls woefully short of the "barrage" necessary to establish presumptive prejudice. In *Harris*, the Ninth Circuit considered a kidnapping and murder case in San Diego in which 136 media references were entered into the record, some referencing the defendant's confession and prior criminal history. 885 F.2d at 1362. Further complicating matters, a bitter disagreement between the District Attorney's Office and the United States Attorney's Office over who should prosecute the defendant splayed out over the pages of San Diego's major newspapers. *Id.* at 1362-63. Nonetheless, the court found no presumptive prejudice. *Id.* Hunter's risk of presumptive prejudice pales in comparison to *Harris*. *See also Bergna v. Benedetti*, 721 F. App'x 729, 731 (9th Cir. 2018) (unpublished) (no presumptive prejudice where defendant submitted 66 news articles); *Murray v. Schriro*, 882 F.3d 778, 804-05 (9th Cir. 2018) (same, where defendant presented "a number of newspaper articles," 57 radio news reports, and testimony from a defense investigator that "a number of people" told him that they thought "the brothers were guilty"); *Hayes v. Ayers*, 632 F.3d 500 (9th Cir. 2011) (same, where one local newspaper published 37 articles, another published 30 articles, and television and radio stations covered the investigation.). Courts routinely reject motions to transfer venue where defendants

introduce dozens of examples of adverse local media coverage. Hunter's evidence can be tallied on one hand.

3. Hunter Fails to Show Sufficiently "Inflammatory" Media Coverage

Hunter's motion is equally vacant of evidence showing that the coverage of this case has been sufficiently inflammatory or prejudicial to warrant the drastic step of venue transfer.

In *Hayes*, a gruesome double-murder trial, the Ninth Circuit considered the effect of media coverage describing the victims' remains—the defendant had removed their heads and hands from their bodies—as well as the defendant's criminal history, his two prior acquittals for murder, and his past escape from a mental hospital. *Id.* at 508. While noting that "the stories about Hayes were unflattering," the Ninth Circuit found it "contained no confession" or "evidence of the smoking-gun variety" that would "invite[] pre-judgment of his culpability." *Id.* at 509 (quoting *Skilling*, 561 U.S. at 383). In *Yount*, the Supreme Court considered a case in which the press reported on not only the facts of the crime but also the defendant's prior confession, his prior plea of temporary insanity, and his conviction for the very same murder (which had been set aside on appeal for a *Miranda* violation). 467 U.S. at 1029. Yet even with publicity of an inadmissible prior conviction, and even after all but 2 of 163 of the venire admitted that they had read or heard about the case, and 126 of them (77%) admitted that they would bring opinions informed by pre-existing knowledge into the jury box, the Supreme Court held that a fair trial was not foreclosed. *Id.* at 1036-40; 1044-45. No straight-faced argument can be made that media coverage of Hunter's embezzlement case compares to that of dismembered murder victims or a previous jury's guilty verdict for the same offense a current jury would decide.

Hunter cites *Sheppard v. Maxwell*, 384 U.S. 333 (1966) in support of his argument, contending that it bears "eerie" similarity to his own case. If so, his motion should be denied. In *Sheppard*, despite "months [of] virulent publicity"—including a front-page "editorial artillery," a search of the defendant in front of hundreds of spectators, and press coverage of his refusal to take a polygraph—the Supreme Court found no denial of due process in the refusal to change venue due to pretrial publicity. *Id.* at 338-41 and 354. Instead, the

interference with due process the court found in *Sheppard* was based on actual prejudice, after trial commenced, when "newsmen took over practically the entire courtroom." *Id.* at 355. Because Hunter's trial can only be transferred at this stage upon showing of presumptive prejudice, *Sheppard* supports denial of Hunter's request.[3]

4. Hunter Fails to Show a "Wave of Public Passion" Against Him

Hunter professes a lathering antipathy against him from local media, but bases this on only a handful of editorials by a single newspaper. Furthermore, he makes no showing of how these editorials so saturated the community that prejudice should be presumed. At least two of the editorials, including one that "actively called for Hunter's resignation," Def. Mtn. at 2, were published shortly before the 2018 congressional race and published more than a year before this case will be tried. The passing of time dampens his argument. *See Casey v. Moore*, 386 F.3d 896, 909 (9th Cir. 2004) (motion to transfer venue denied where coverage was four to eight months before trial); *Harris*, 885 F.2d at 1363 (same, where peak coverage was four months before trial); *United States v. Philpot*, 733 F.3d 734, 741 (7th Cir. 2013) (same, where most of the media coverage was one year prior to trial in a "fairly large" community); *United States v. Lehder-Rivas*, 955 F.2d 1510 (11th Cir. 1992) (same, where peak coverage was five months before trial).

Moreover, in highlighting these negative newspaper articles, Hunter buries the headline: he was reelected to Congress after the indictment was filed and most of the media coverage he cites was published. A congressman on trial in the very federal district where he was

[3] The other two cases cited in Hunter's motion are inapposite. In *Farr v. Pitchess*, the Ninth Circuit considered the dueling interests of a trial judge's power to enforce court orders and the First Amendment, and affirmed the contempt conviction of a reporter who refused to disclose his confidential source during the trial of Charles Manson. 522 F.2d 464, 469 (9th Cir. 1975). In *Levine v. United States Dist. Court for Cent. Dist.*, a case also involving the freedom of the press, the Court affirmed the denial of newspaper association's request for change of venue as an alternative to a restraining order. 764 F.2d 590, 600 (9th Cir. 1985) Neither of these cases relate to a defendant's motion for a change of venue.

popularly elected less than a year earlier stands a far better chance of an impartial jury than all of the following defendants, whose motions to transfer venue were denied:

- The CEO who presided over Enron's propping up of stock prices before its collapse into bankruptcy. *See Skilling*, 561 U.S. at 385;
- The "Boston Marathon Bomber." *See United States v. Tsarnaev*, 2014 U.S. Dist. LEXIS134596, at *5-9 (D. Mass. Sept. 24, 2014);
- The "Underwear Bomber." *See United States v. Umar Farouk Abdulmutallab*, 2011 Dist. LEXIS 104159, at * 15 (E.D. Mich. Aug. 27, 2013);
- An American heiress turned bank robber. *See United States v. Hearst*, 466 F. Supp. 1068, 1076 (N. D. Cal. 1978), *modified*, 638 F.2d 1190 (9th Cir. 1980);
- Members of a "highly controversial" spiritual community who conspired to kill the United States Attorney. *See Croft*, 124 F.3d at 1113-15;
- A notorious Columbian drug lord. *See U.S. v. Lehder-Rivas*, 955 F.2d 1510; 1525 (11th Cir. 1992);
- Cliven Bundy, after the local press reported that Senator Harry Reid condemned his supportive protestors on the Senate floor, calling them "a dangerous group of militants" and "domestic terrorists." *United States v. Payne*, No. 16-CR-046, 2016 WL 7380744, at *4 (D. Nev. Dec. 20, 2016);
- The six conspirators to the 1993 World Trade Center bombing. *See United States v. Yousef*, No. S12 93-Cr.0180, 1997 U.S. Dist. LEXIS 10449, at *8-10 (S.D.N.Y. July 18, 1997);
- Zacharias Moussaoui, a plotter of the September 11th hijacking. *See In re Tsarnaev*, 780 F.3d 14, 16 (1st Cir. 2015) (describing the Fourth Circuit's dismissal of Moussaoui's interlocutory appeal of a motion to change venue);
- A man who bombed the very courthouse where Hunter will be tried. *See United States v. Love*, 642 F. App'x 700, 701 (9th Cir. 2016) (unpublished) (rejecting argument that prejudice should be presumed because "the [Edward J. Schwartz United States Courthouse] was the crime scene").

Hunter's case is far less notorious than any of these examples.[4]

[4] It is also unlikely the news outlets these defendants argued were so adverse that a change in venue was justified published opinion columns by the same defendants. But not

Hunter also makes no showing of any actual affect that adverse media coverage has had on his potential jury pool. In *Croft,* the Ninth Circuit found no presumptive prejudice even where the defendants presented evidence that more than 40% of Oregonians (the district they were tried) believed that the defendants were guilty. 124 F.3d at 1113. In *United States v. Sherwood*, the Ninth Circuit found no presumed or actual prejudice where 96% of the jurors admitted that they were aware of the case and 60% mentioned that the victim, the daughter of Mirage Resorts CEO Steven Wynn, was kidnapped. 98 F.3d 402, 410 (9th Cir. 1996). By contrast, all Hunter offers in support of his request is meager evidence of media coverage, which attends any trial of a high-profile defendant.

Even if Hunter's motion demonstrated the level of negative media scrutiny the law demands for a transfer of venue—and he hasn't come close—there is no evidence it has so pervasively consumed the region that it would be "impossible" to find twelve unbiased jurors in a district of more than 3.5 million people.[5] *See Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991) (potential for prejudice mitigated by the size of the "metropolitan Washington [D. C.] statistical area, which has a population of over 3 million"); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (plurality opinion) (reduced likelihood of prejudice where venire was drawn from a pool of over 600,000 individuals); *Skilling*, 561 U.S. at 382 (noting Houston's "large, diverse pool" of more than 4.5 million potential jurors made the defense claim of prejudice "hard to sustain").

Without evidence of a presumptively tainted jury pool, Hunter makes a disquieting and novel argument: he points to the fact that he supported the presidential bid of then-candidate

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only has the Union-Tribune done just that, Hunter has broadcast their publications of his op-eds to his followers and supporters. As just one example, the first of the scrolling news articles on the marquee of the Congressman Duncan Hunter's House of Representatives website (https://hunter.house.gov/) (accessed June 26, 2019) promotes his March 8, 2019 op-ed in that very paper.

[5] *See* https://www.census.gov/quickfacts/fact/table/sandiegocountycalifornia,CA/PST045218 (listing San Diego County's population at 3,343,364 as if July 1, 2018) and https://www.census.gov/quickfacts/imperialcountycalifornia (listing Imperial County's population as 181,827 as of July 1, 2018).

Donald J. Trump, who received 38% of San Diego County's votes, to Hillary Clinton's 56%. Hunter is suggesting that a defendant's public support for a political candidate should justify the transfer of his federal criminal trial. He does not even attempt to demonstrate how his endorsement of a (winning) candidate "renders it impossible to empanel an impartial jury." *Bergna v. Benedetti*, 721 F. App'x 729, 730 (9th Cir. 2018) (unpublished). *See also Payne*, 2016 WL 7380744, at *6 (denying transfer of venue where "television commercial depicting Cliven Bundy's recorded statements which questioned whether African Americans were 'better off as slaves'" and where the Democratic party mailed printed advertisements that negatively tied Cliven Bundy to President Elect Donald Trump). And much closer relationships to much more politically embattled politicians have fallen short of qualifying for the extreme remedy of pre-trial transfer. *See, e.g, United States v. Haldeman*, 559 F.2d 31, 59-64 (1976) (former Attorney General John Mitchell, former Assistant to the President Harry R. Haldeman, and once Assistant for Domestic Affairs to the President John D. Ehrlichman not entitled to pre-trial venue transfer despite "extraordinarily heavy" coverage of Watergate break-in and allegations of wrongdoing in upper-levels of Nixon administration unrelated to break-in). If there is any legal precedent, from any federal or state court, trial or appellate, for transferring the venue of a case based on a defendant's political endorsement, Hunter certainly has not sniffed it out.

B. Hunter Fails to Explain Why the Eastern District of California Would Be A More Appropriate Venue

Hunter insists that this Court "must transfer [his] case…to the Eastern District of California." Def. Mtn. at 4. The reasoning that he provides for transferring venue to this non-adjacent district is that Donald Trump fared better with voters in three of its 34 counties than he did in San Diego County. This is a remarkable request - the Court is charged with empaneling an impartial jury, not a jury of people Hunter believes will be like-minded supporters of his factually irrelevant political positions.

As an initial matter, Courts have stated that criminal defendants are not entitled to forum shop, even in the context of Rule 21(b) motions to transfer venue for the convenience of the

parties. *See, e.g., United States v. Miller*, 314 F.R.D. 574, 576 (S.D. Ohio 2016) (citing *United States v. Jamal*, 246 F. App'x 351, 369 (6th Cir. 2007) (unpublished) ("A defendant does not have the right to shop for a forum in which his criminal case may be heard.")).

More importantly, the jury pool's 2016 preference for Republican over Democratic presidential candidates is at best irrelevant. It is not uncommon for a trial judge to ask a venire, for example, what kind of bumper stickers they have on their cars. The purpose of this type of question is to flag jurors who could, potentially, allow their political viewpoints to come between the facts and the law during jury deliberations; it is designed to eliminate, to the best extent possible, political passions infecting the jury room. The reasoning Hunter provides for his request to transfer venue to the Eastern District of California reveals that his motion is less an attempt to eliminate politics from seeping into jury deliberations and more a conscientious effort to enable it.

Even if his motives were well grounded, Hunter's analysis is not. Inevitably, the prosecution of a politician will generate significant media coverage. Hunter asserts that Google users have searched his investigation 7.5 million times and that "potential jurors are just a keystroke away from hundreds of thousands of press articles and blog postings online, most if not all of a very negative nature." Def. Mtn. at 3. The jury pool in the Eastern District of California also has access to the internet, and, like the rest of the country, has been exposed to news about this case. Hunter fails to explain why potential jurors in this district face greater exposure to internet articles and blog posts than those in other districts. Courts have rejected requests for venue transfer where, as here, the media coverage will follow the case. *United States v. Menendez*, 109 F. Supp. 3d 720, 732 (D.N.J. 2015) (rejecting "pervasive pretrial publicity" in New Jersey regarding fraud charges against a U.S. Senator as basis for transfer from New Jersey to Washington, D.C., because "publicity would follow [the trial] to Washington."); *United States v. Avery*, No. 09-CR-196, 2010 WL 1541342, at *7 (E.D. Wis. Apr. 19, 2010) (no merit to contention that transfer to another district would alleviate publicity concerns). Were internet stories alone sufficient to establish presumptive prejudice, federal trials would be litigated into constant nomadic searches for venues somehow isolated from

highly publicized trials. Hunter's politically motivated attempt at forum shopping should be rejected by the Court.

III

CONCLUSION

This district is demographically diverse in every sense of the word: ethnically and economically, politically and religiously, by those who claim it as home by birthright and those who migrated here from other states and nations. And it includes most of the very same congressional district that reelected Congressman Hunter after his indictment in this case.[6] Hunter makes no showing that it cannot produce 12 jurors who can be entrusted with this trial.

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Respectfully submitted,

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[6] California's 50th Congressional District (Hunter's district) encompasses the central and northeastern parts of San Diego County, and a small part of Riverside County. *See* https://www.casd.uscourts.gov/Jurors/Jurisdiction-Map.aspx; https://en.wikipedia.org/wiki/California%27s_50th_congressional_district